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EXAMINER	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BERND SCHESSL, HELMUT JERG,
and MICHAEL ROSENBAUER

Appeal 2009-003441
Application 10/606,008
Technology Center 3600

Decided: December 11, 2009

Before WILLIAM F. PATE, III, JOHN C. KERINS, and KEN B. BARRETT, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Bernd Schessl et al. (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 8-15, the only claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants' claimed invention is to a dishwashing machine having upper and lower containers, each of which contain a dishwashing system. Claims 8 and 9, reproduced below, provide further detail as to the claimed subject matter:

> 8. A dishwashing machine, comprising:
>
> a dishwashing machine housing having an internal height;
>
> a pair of retractable pull-out upper and lower containers mounted one above the other in said housing;
>
> each of said retractable pull-out containers containing a dishwashing system; and
>
> said upper and lower containers having a total height less than said internal housing height.
>
> 9. The dishwashing machine according to claim 8, wherein said housing has a pair of opposed sides and a base, each of said retractable pull-out upper and lower containers having a front piece and being mounted in said housing such that said

> retractable pull-out upper and lower containers are located between said opposed sides of said housing and said front pieces of said of retractable pull-out upper and lower containers form a front of the dishwashing machine and said lower container is above said base of said housing and further comprising means, extending between the dishwashing machine and a surface on which the dishwashing machine is to be supported, for maintaining said base of said housing at a height above the surface on which the dishwashing machine is to be supported.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Borgen	US 4,818,043	Apr. 4, 1989
Meyer[1]	DE 35 01 364 A1	Jul. 17, 1985
Sargeant	WO 98/33426	Aug. 6, 1998

The Examiner has rejected:

(i) claims 8, 10 and 11 under 35 U.S.C. § 102(b) as being anticipated by Sargeant[2];

(ii) claims 9 and 12-14 under 35 U.S.C. § 103(a) as being unpatentable over Sargeant in view of Meyer; and

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[1] All references to Meyer herein are to an English language translation of the document prepared by John Koytcheff, dated January 31, 2008, of record in this application.

[2] Sargeant and Meyer are referred to by Appellants and the Examiner by their document numbers or shortened forms of those numbers. We elect to refer to them by the last name of the first-named inventor listed on the documents.

(iii) claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Sargeant in view of Meyer and Borgen.

ISSUES

Appellants contend, with respect to claims 9 and 12-14, that Sargeant does not disclose a dishwashing machine having a housing whose sides and base are raised above a surface on which the dishwashing machine is supported, and that Meyer is not directed to dishwashing machines having upper and lower pull-out containers. The Examiner asserts that Sargeant discloses the use of feet located underneath the base for maintaining the base above the surface on which the machine is supported, and that it would have been obvious, in view of Meyer, to make the feet adjustable. The issue presented here is whether Appellants have demonstrated that the Examiner erred in concluding that the subject matter of these claims would have been obvious in view of Sargeant and Meyer.

Appellants argue, with respect to claim 15, that the Examiner was not entitled to consider or include the teachings of the Borgen patent in combination with Sargeant and Meyer because Borgen is non-analogous art. The Examiner asserts that Borgen is pertinent to the same problem faced by Appellants--how to conceal a gap between a raised device and the surface of the floor supporting the device. The issue presented here is whether Appellants have demonstrated that the Examiner erred in relying on Borgen in concluding that the subject matter of claim 15 would have been obvious.

PRINCIPLES OF LAW

An appellant has the burden on appeal to the Board to demonstrate error in the Examiner's position. *See Ex parte Yamaguchi*, 88 USPQ2d 1606, 1614 (BPAI 2008) (on appeal, applicant must show examiner erred); *Ex parte Fu*, 89 USPQ2d 1115, 1123 (BPAI 2008); *Ex parte Catan*, 83 USPQ2d 1569, 1577 (BPAI 2007); and *Ex parte Smith*, 83 USPQ2d 1509, 1519 (BPAI 2007).

Anticipation is established when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention. *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444 (Fed. Cir. 1984).

A claim is unpatentable under 35 U.S.C. § 103(a) if "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007) ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.").

ANALYSIS

Claims 8, 10 and 11--Anticipation by Sargeant

Appellants contend that the rejection of these claims is being appealed, includes this rejection in the grounds to be reviewed on appeal, and includes a subheading and discussion under the "ARGUMENT" section of the Appeal Brief purporting to contest the rejection. (Appeal Br. 3-5). Appellants' "argument" directed to this rejection is nothing more than a restatement of certain claim elements set forth in claim 8, together with a nearly verbatim restatement of the Examiner's grounds for the rejection, and a request that the rejection be withdrawn. (Appeal Br. 4-5).

Appellants have not assigned error to any of the Examiner's findings, and have not demonstrated that the Sargeant reference does not identically disclose one or more elements in any of claims 8, 10 and 11. Appellants therefore have not met their burden of establishing error in the ultimate finding that claims 8, 10 and 11 are anticipated by Sargeant. *Yamaguchi*, 88 USPQ2d at 1614. The rejection of these claims under 35 U.S.C. § 102(b) will thus be affirmed.

Claims 9 and 12-14--Obviousness--Sargeant in view of Meyer

and

Claim 15--Obviousness--Sargeant in view of Meyer and Borgen

Appellants argue claims 9 and 12-14 as a group, with no separate arguments presented for any of the claims. (Appeal Br. 4-5). Claim 9 will be taken as being representative of the group, and claims 12-14 will stand or fall with claim 9. 37 C.F.R. §41.37(c)(1)(vii) (2009). Appellants present arguments for the patentability of claim 15, which depends indirectly from

claim 9, under both the subheading for claims 9 and 12-14, and the subheading for claim 15.

For both claims 9 and 15, Appellants contend that Sargeant does not teach or disclose a dishwashing machine having a housing whose sides and base are raised above a surface on which the dishwashing machine is supported.[3] (Appeal Br. 6). Appellants refer to Figure 8 of Sargeant, asserting that the dishwashing machine there illustrated has a housing whose sides extend to the surface on which the dishwashing machine is supported, and whose base rests on the surface. (*Id.*).

The Examiner's position in this regard is that Figure 24 of Sargeant discloses a dishwashing machine supported off of the floor surface by legs, and thus the sides and base of the housing are raised above that surface. (Answer 5). The Examiner further points out that such a configuration is also evidenced in the Meyer reference, which more clearly shows the construction of the legs that are connected to the base of the machine illustrated therein. (*Id.*). The Examiner additionally avers that the illustration in Figure 8 of Sargeant, relied on by Appellants in support of their position, is not a representation of an end product, but instead illustrates a stripped carcass or bare chassis of the machine cabinet showing only certain structural features thereof. (Answer 5-6). The inference to be made here is that the Examiner is asserting that the structure shown in Figure

[3] Claim 9 requires only the base of the housing to be maintained at a height above the surface on which the dishwashing machine is to be supported. The maintaining of the bottom edges of the side panels at a height above the surface on which the dishwashing machine is to be supported is a limitation introduced in dependent claim 15. (Appeal Br., Claims Appendix, Claims 9, 15).

8 of Sargeant will, in the end product, be supported on legs, as illustrated in Figure 24.

We note initially that Appellants' argument directed to the alleged failure of Sargeant to disclose a dishwashing machine having a housing whose sides and base are raised above a surface on which the dishwashing machine is supported, fails to recognize (*see* fn. 3) that claim 9 does not require the sides of the housing to be raised above the surface on which the dishwashing machine is to be supported. Appellants' argument is thus not commensurate with the scope of the claim, and attempts to distinguish the claim on the basis of a limitation not found therein.

Further, Appellants have not addressed in any way the Examiner's findings directed to the structure disclosed in Figure 24 of Sargeant, in particular the asserted relationship of the legged structure in Figure 24 as it relates to the structure in Figure 8. Appellants have thus not established error in the Examiner's position that the sides and base of the Sargeant dishwashing machine are maintained at a height above the surface on which the dishwashing machine is supported. We cannot discern any apparent error in the Examiner's position.

Appellants only other argument directed to claims 9 and 12-14 is that the Meyer reference is not directed to a dishwashing machine having upper and lower pull-out containers, and that claim 8 [thus also claim 9] requires those elements. (Appeal Br. 5-6). This argument is nothing more than an attack on the Meyer reference individually, without consideration of the teachings of the cited references as a whole, and is not probative of the existence of error in the rejection of these claims as being obvious. *See In re Keller*, 642 F.2d 413 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091 (Fed.

Cir. 1986) (nonobviousness cannot be established by attacking references individually where rejections are based on combinations of references). Meyer is relied on for its teaching of the use, on a dishwasher, of legs that are adjustable (Answer 3), a feature having essentially nothing to do with whether or not the dishwasher has upper and lower pull-out containers. Appellants have not demonstrated why the absence of upper and lower pull-out containers would cause a person of ordinary skill in the art to decline to consider Meyer for its teaching of adjustable-height legs.

Appellants include a further argument directed to claim 15, asserting that the cited Borgen reference was improperly combined with Sargeant and Meyer because it is non-analogous art. (Appeal Br. 8-9). The Examiner relied on the teaching in Borgen of providing a base panel having a height substantially equal to that of the feet below the base of a cabinet housing, concluding that it would have been obvious to provide a similarly sized base panel on the Sargeant dishwasher in order to conceal the feet of the machine when viewed by persons positioned in front of the machine. (Answer 4).

Appellants contend that the Borgen reference, which is directed to refrigerated display cases, is neither in Appellants' field of endeavor, nor reasonably pertinent to the problem with which Appellants were concerned. These two factors are indeed the appropriate ones in determining whether a particular prior art reference is analogous art. *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986).

Appellants aver that they were concerned with providing a dishwashing machine that provides a continuous base panel when placed in a row of kitchen appliances. (Appeal Br. 9). Appellants contend that the Borgen patent is concerned with completely different and unrelated

problems having to do with the metal frames surrounding glass panels in refrigerated display cases. (*Id.*). While this appears to be an accurate characterization of the principal focus of the Borgen disclosure, the appropriate inquiry is not whether the claimed invention and the prior art reference are directed to addressing the same problem, but rather whether the knowledge that can be gleaned from teachings of prior art references outside Appellants' field of endeavor would have been reasonably pertinent to the problem sought to be solved by Appellants. *In re Ellis*, 476 F.2d 1370 (CCPA 1973) (structural and functional similarities given great weight in determining pertinency); *see also In re Heldt*, 433 F.2d 808, 812 (CCPA 1970). As such, the argument is misplaced.

The Examiner notes that the Borgen display cases are raised above the floor surface, producing a gap between the bottom of the cases and the floor. (Answer 7). The Examiner further points out that Borgen discloses providing a base panel to conceal the gap to provide a more aesthetic, finished appearance. (*Id.*). The Examiner thus determined that Borgen included teachings directed to the same problem faced by Appellants. Even though that might not have been the main focus of Borgen, as argued by Appellants, Appellants have not demonstrated that the teaching of providing a base panel in Borgen would not have been reasonably pertinent to the problem they set out to solve. We thus do not find error in the Examiner's reliance on the Borgen patent in combination with the teachings of Sargeant and Meyer.

The rejection of claim 9, and that of claims 12-14 depending from claim 9, will be sustained. The rejection of claim 15 will also be sustained.

CONCLUSIONS

Appellants have not established that the Examiner erred in rejecting claims 8, 10 and 11 under 35 U.S.C. § 102(b) as being anticipated by Sargeant.

Appellants have not established that the Examiner erred in rejecting claims 9 and 12-14 under 35 U.S.C. § 103(a) as being unpatentable over Sargeant and Meyer.

Appellants have not established that the Examiner erred in rejecting claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Sargeant, Meyer and Borgen.

DECISION

The decision of the Examiner to reject claims 8-15 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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